

EXHIBIT 3

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 AT HUNTINGTON

4 _____
5 IN RE: C.R. BARD INC., :
6 PELVIC REPAIR SYSTEM PRODUCTS : 2:10-MD-2187
7 LIABILITY LITIGATION :
8 _____
9 THIS DOCUMENT RELATES TO ALL CASES :
10 _____x

11 **TELEPHONIC STATUS CONFERENCE**
12 **BEFORE THE HONORABLE CHERYL A. EIFERT,**
13 **UNITED STATES MAGISTRATE JUDGE**
14 **FRIDAY, AUGUST 15, 2014**

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16
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1 **APPEARANCES:**

2 **(VIA TELEPHONE)**

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15 **FOR THE DEFENDANTS:**

16 **LORI G. COHEN, ESQ.**

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1 P R O C E E D I N G S

2 Had before The Honorable Cheryl A. Eifert, United
3 States Magistrate Judge, United States District Court, for
4 the Southern District of West Virginia, at Huntington, via
5 teleconference, on August 15, 2014, as follows:

6 COURTROOM DEPUTY CLERK: Good morning.

7 I'd like to confirm that our court reporter today is on
8 the line, Cathy Stant.

9 COURT REPORTER: Yes, Laura. This is Cathy.

10 COURTROOM DEPUTY CLERK: Cathy is on the line.

11 May I ask who is on the line for plaintiffs?

12 MR. GARRARD: Laura, Henry Garrard and Josh Wages
13 from my office.

14 MR. MIGLIORI: Don Migliori from Motley Rice.

15 COURTROOM DEPUTY CLERK: I'm sorry, I did not get
16 your name.

17 MR. MIGLIORI: Donald Migliori from Motley Rice is
18 also here.

19 COURTROOM DEPUTY CLERK: Okay. If you don't mind,
20 would you please spell your last name for me?

21 MR. MIGLIORI: M-I-G-L-I-O-R-I.

22 COURTROOM DEPUTY CLERK: Thank you very much.

23 Anyone else on the line for plaintiffs?

24 All right, let's have defense counsel, please.

25 MS. COHEN: Good afternoon. This is Lori Cohen

1 with Greenberg Traurig. And I am in my office with Cliff
2 Merrell and Beth Toberman.

3 COURTROOM DEPUTY CLERK: Is that everyone for
4 defendants?

5 MS. COHEN: I'm not certain.

6 COURTROOM DEPUTY CLERK: Okay. If everyone will
7 hold one moment, I will get Judge Eifert.

8 MS. COHEN: Thank you.

9 THE COURT: How is everyone? Hello.

10 MS. COHEN: Good morning, Judge.

11 THE COURT: Hello. And we do have Cathy on the
12 line?

13 COURT REPORTER: Yes, Judge. This is Cathy.

14 THE COURT: Hi, Cathy.

15 COURT REPORTER: Hi, Judge.

16 THE COURT: All right. I do have the agenda, and
17 we might as well just dive right in. Let's see, I have as
18 the first issue the Weiland deposition documents. Who would
19 like to start?

20 MS. COHEN: Yes. I'm sorry. This is Lori Cohen
21 on behalf of the defendant, and I have my partner, Beth
22 Toberman, who has been dealing with these issues, and I
23 would love for her to be able to respond if Your Honor
24 agrees.

25 THE COURT: Certainly.

1 MS. TOBERMAN: Hi, Judge Eifert. This is Beth
2 Toberman. So just to give you a brief update. Bard has
3 provided plaintiffs with a list of documents that were
4 previously produced that are responsive to the requests 6
5 through 21 of the ninth set of document requests. We have
6 also provided a production yesterday of documents responsive
7 to requests 6 through 12. We are working on review and
8 production of additional documents responsive to these
9 requests.

10 In addition, plaintiffs recently, I guess about a week
11 ago, sought -- or requested that we search Mr. Weiland's
12 data and some additional custodian's data for additional
13 search terms. Over a thousand search terms were provided to
14 us. And we are in the process of running those searches and
15 reviewing those data and making productions consistent with
16 their request.

17 We anticipate that we will have all of these
18 productions completed over the weekend. It may be Sunday,
19 but that is ten days prior to the deposition. And we've
20 alerted plaintiffs to that, that timeline.

21 THE COURT: Okay. All right. Who would like to
22 speak to this issue on the plaintiffs' behalf?

23 MR. GARRARD: Your Honor, I'll let Josh Wages, who
24 has been dealing with Ms. Cohen's office, respond.

25 THE COURT: All right.

1 MR. WAGES: Thank you, Your Honor. We, at this
2 point, are working and I believe that our attempts to work
3 this out without the Court's involvement have been
4 successful. I don't have anything to bring to the Court's
5 attention in terms of issues to raise. And, so I think
6 that, provided we stay on track for this weekend's
7 production, that will give us these documents within ten
8 days, I don't think that we're going to have any issues to
9 raise. So I believe that issue has been addressed.

10 THE COURT: Well, that is very good news. I'm
11 happy. I'm very happy with both of you -- all of you.

12 (Inaudible speaker.)

13 THE COURT: Yes, that's good. All right.

14 Well, let's move on to number 2 then, use of
15 confidential documents during treating physician's
16 deposition. Who would like to speak to that?

17 MR. GARRARD: Judge, part of that at least is an
18 issue we raised, and Josh Wages has been in communication
19 with various plaintiffs' lawyers about at least some issues
20 pertaining to that, and since he's had the direct
21 communications, I'd like him to explain to it the Court,
22 please.

23 MR. WAGES: This is Josh Wages. Your Honor,
24 approximately a week to a week and a half ago, I received a
25 call from a plaintiff's lawyer with one of the initial trial

1 pool cases, I call them the Bard 200. Other folks refer to
2 them as Wave one and two. But this lawyer was in a
3 deposition and had attempted to use -- to show the doctor
4 some documents produced by Bard in this litigation that had
5 been marked as confidential. And believing that he needed
6 to have a protective order signed, he attempted to do that
7 on the record during the deposition. And it was related to
8 me by this attorney that defense counsel representing Bard
9 during this deposition essentially told this doctor that
10 these are confidential documents; Bard objects to their use,
11 and he's not required to sign the protective order. And at
12 that point there was disagreement between the lawyers. And
13 my understanding is that the doctor declined to sign the
14 protective order. And the plaintiffs' lawyer was unable to
15 use the confidential documents.

16 I advised that attorney that if he felt strongly enough
17 about the issue and wanted to open that deposition back up,
18 that he contact the Court and bring it to the Court's
19 attention. And I believe, at least he told me that he had
20 contacted your office and gotten some direction. And I kind
21 of felt that the issue would be addressed.

22 But then I got a call a couple nights ago from another
23 attorney actually in the exact same situation, same defense
24 lawyer, and he wanted to know what to do about the
25 situation, because it had now come up, you know, again, and

1 again the same thing had occurred.

2 The doctor didn't sign the confidentiality order at
3 first. I think they ultimately had some acrimonious back
4 and forth off the record, and ultimately the doctor was
5 persuaded to sign the confidentiality order.

6 But to get to our point, from a global perspective --
7 and I have raised this issue with Ms. Cohen and Mr.
8 Merrell -- our position would be that in order that the --
9 the protective order addresses the use of confidential
10 documents during depositions. And our position would be
11 there's no need to have a doctor during a deposition sign a
12 protective order, because there is a provision under the
13 protective order that allows the doctor -- or, excuse me --
14 allows a party to designate the deposition testimony as
15 confidential.

16 And as I've kind of raised a couple of times with
17 defense counsel, the vast majority of the documents that are
18 at issue have been used in various pleadings filed publicly,
19 as well as at trial, so it's our position that the vast,
20 vast majority of the documents that are being used with
21 doctors during depositions are no longer entitled to
22 confidentiality in any event. And that's -- we just want to
23 get some guidance so that I can properly advise other
24 plaintiffs' lawyers, if they should have another issue, how
25 to address this going forward.

1 THE COURT: Yes. I do, I do recall somebody had
2 contacted the office about that, and I checked the Pretrial
3 Order. I think it might have been Pretrial Order Number 7
4 -- I'm just going on my memory -- but I looked at the
5 Pretrial Order, it was very clear to me that -- and I think
6 it involved the treating physician, it was a witness, who
7 was not a party, not employed by a party, not retained by a
8 party -- it was very clear to me that a witness such as a
9 treating physician is not required to sign a protective
10 order. So I do not believe that a treating physician would
11 ever have to sign the protective order. And I don't believe
12 that would prevent a party from using a confidential
13 document at a deposition.

14 I think the Order is very clear that confidential
15 documents can be used in depositions. And there are
16 guidelines in place and precautionary safeguards in place to
17 handle that. And none of those include making the witness
18 sign onto a protective order.

19 MR. WAGES: Thank you, Judge.

20 MR. MERRELL: Your Honor, I'm here on behalf of
21 Bard.

22 THE COURT: Yes.

23 MR. MERRELL: Sounds like you're pretty clear in
24 your decision. I just wanted to raise, the only concern we
25 had is -- you're right, it is absolutely correct that the

1 documents are protected under the confidentiality order in
2 terms of Bard being able to designate those confidential.
3 Your Honor, our only concern really is that the doctor
4 becomes aware of the documents, and then outside of the
5 context of depositions, he could disclose the information in
6 those, in those materials, and that would be a problem with
7 a protective order. But, Your Honor, if you're set in terms
8 of your decision, we're happy to communicate that on to
9 everyone here. But that was sort of our view or our
10 concern, just so you understand, that was our concern, and
11 that's why we believed that the physician needed to sign
12 that agreement, and in many of the depositions the
13 plaintiffs' counsel agreed; that's why they had brought it
14 with them for the physician to sign. Just so you understand
15 our position, that that was our concern.

16 THE COURT: Well, what I -- you know, what I did
17 is I looked at what the Order said. And the Order did not
18 say that a witness, such as a treating physician, had to
19 sign onto the protective order. So I'm telling you what the
20 Order says. It really wasn't me making a particular
21 decision one way or the other. I'm telling you what the
22 Order said. And the Order does not require anyone, such as
23 a physician -- and, you know, quite frankly, it makes
24 absolutely -- I really don't know how a court could order a
25 witness to be bound by a protective order like that when

1 they're not a party; they're not employed by a party;
2 they're not retained by a party. They're just a witness.
3 I mean, I don't think you can force people to sign
4 protective orders. You know, I think that goes a little
5 beyond the authority logically of the Court. I'm sure --
6 I'm sure you could -- I'm sure these treating physicians
7 would just as soon not be involved in these lawsuits at all.
8 So if you gave them the option, they'd probably say, "Hey, I
9 won't sign that protective order, and I also won't give a
10 deposition."

11 UNIDENTIFIED SPEAKER: Right. Although I'd say,
12 Your Honor, in the vast majority of the cases the physicians
13 have signed them. And they've been willing to agree to be
14 bound by it. But our just looking at the protective order,
15 it essentially says that you can't disclose the information,
16 you can't -- the parties and the attorneys can't disclose or
17 divulge the information, except in accordance with the
18 Order. And the Order doesn't really say, okay, if you're in
19 a deposition you can show it to somebody. It has a very
20 strict way in which you sign the agreement to be bound by
21 the protective order, and that's really the only way you
22 could disclose.

23 But I don't want to spend too much time. I was just
24 trying to state our position.

25 THE COURT: You know, I feel very comfortable with

1 the way I've interpreted that Order, and I do not think it
2 requires a treating physician or a witness to, to -- I do
3 not think it requires them to sign the protective order in
4 order to be given a confidential document during a
5 deposition. So, you know, that's the way I feel about it.
6 And I don't think you can require them to sign onto it. If
7 they're willing to do it, then, you know, then that's fine.
8 But if they're not willing to do it, I don't think that you
9 can make them do it.

10 UNIDENTIFIED SPEAKER: Okay.

11 MS. COHEN: Judge, the other thing that comes to
12 mind, sometimes, you know, you'll say that this deposition
13 and the documents are subject to the protective order. I
14 suppose you could advise a physician that they are
15 confidential documents and that, I don't think that --
16 without making him or her sign the agreement.

17 THE COURT: Right. You know, I would be -- I
18 would really, quite frankly, doubt that the physician's
19 going to rush out and talk to a lot of people about these
20 documents. I mean, I don't know what you're showing them,
21 but I doubt that they have very much interest once they
22 leave the deposition. They're not taking the documents with
23 them, right? You're not giving them to them to keep?
24 You're just showing them documents during their deposition;
25 is that right?

1 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

2 THE COURT: I mean, I really can't imagine they're
3 so interested in Bard's documents that they're -- you know,
4 can't wait to rush out and share all that information with
5 the people in their neighborhood or whatever.

6 MS. COHEN: Well, I would think that is true. The
7 only thing that comes to mind is, you know, I guess, you
8 know, you could have a physician who was shown them and then
9 talks to his other fellow colleagues at the hospital about
10 it, or, you know, that -- or shared the information at a
11 conference or something like that. Hey, did you know I was
12 deposed last week by a plaintiff's attorney or defense
13 attorney, he showed me something that said, X, have you seen
14 that?

15 That's the only, I guess that was the only -- and look,
16 neither Mr. Merrell nor I was present, so we're getting all
17 that second and thirdhand anyway. And honestly, with your
18 ruling, Your Honor, we aren't trying to bicker with you. We
19 will advise the troops of your ruling and make it clear,
20 so --

21 THE COURT: Okay. Okay. But, yes, you can tell
22 them that these documents are marked confidential and
23 they're meant to be kept within the litigation.

24 MS. COHEN: Yes, I think that's perfect. I think
25 maybe we can make that instruction or give that direction

1 without having them sign it, and that should probably solve
2 everyone's problems.

3 MR. WAGES: This is Josh Wages, Your Honor. Just
4 regarding that point, I think that there needs to be some
5 clear understanding on behalf of the lawyers who are
6 defending the deposition as to exactly what is no longer
7 entitled to confidential designation, because there have
8 been a number of these documents. And truthfully, I think
9 nearly every one of the documents that are being used for
10 purposes of the learned intermediary inquiry on depositions
11 have been disclosed publicly in this litigation. So to
12 represent that those documents are confidential is not
13 accurate at this point.

14 Now, if there are other documents that are still
15 entitled to a confidential designation, that's fair game.
16 But the vast majority of these documents are no longer
17 confidential.

18 UNIDENTIFIED SPEAKER: Your Honor, that is true,
19 that point, some of them are not confidential. I don't know
20 if it's the vast majority. I mean, certainly I view and
21 there could be some -- but I don't know if it's the vast
22 majority. I think we can simply tell the doctor, some of
23 these documents are confidential and should not be
24 disclosed. I don't know that we point out each and every
25 one, that might be belaboring it too much.

1 UNIDENTIFIED SPEAKER: We can handle it.

2 THE COURT: I think that, you know, the
3 bottom-line is that you're not going to be able to do much
4 to enforce it if the doctor goes to the next hospital
5 meeting and says, I saw a document that was, you know, from
6 my deposition with Bard. But I think you can say, these
7 documents are marked confidential in this litigation, so
8 you're really not supposed to disclose them, and leave it at
9 that, you know.

10 UNIDENTIFIED SPEAKER: Okay.

11 MS. COHEN: So we'll pass it on to our side, Your
12 Honor.

13 THE COURT: Okay. All right. The next issue,
14 reports the parties have agreed to revise. I did see your
15 revised pathology protocol and that looked to be an
16 acceptable protocol to me. I think it did incorporate
17 everything we had discussed. I think Kate has it. I know
18 she has it. She had sent it to me and showed it to me. And
19 I think she was -- maybe she had circled a typo or something
20 and was -- so that, I think you're getting ready to enter
21 that, are you not?

22 MS. COHEN: Didn't we already admit that?

23 UNIDENTIFIED SPEAKER: We did.

24 MS. COHEN: Yeah, I think we already submitted
25 that, but if there's a typo, we can always reach out to Kate

1 and figure that out.

2 THE COURT: She has shown that to me. So I think
3 they're getting ready to maybe enter that. And then I
4 think, as far as the motion, I need to do something with
5 that. I was sort of holding onto that before I left for
6 vacation; I was waiting for you to get your protocol done.
7 So at this point I'll have to just do something to get that
8 motion resolved. But it will most likely refer to the fact
9 that you agreed on a revised protocol, and I'll reference
10 the new PTO number. All right.

11 UNIDENTIFIED SPEAKER: Okay.

12 THE COURT: Okay. All right. Now, going down the
13 issues raised by Bard. The first issue I have here is
14 additional corporate deposition resolving duplicative
15 testimony. Who would like to discuss that?

16 MS. COHEN: I think we've decided, Your Honor, to
17 table numbers one and two from the discussion.

18 THE COURT: All right.

19 MS. COHEN: Take those off today, unless Mr.
20 Garrard or Mr. Wages disagrees with that, but I think we'd
21 decided we'd continue to discuss.

22 UNIDENTIFIED SPEAKER: That's fine.

23 THE COURT: All right, inappropriate use of
24 documents produced in CK litigation.

25 MS. COHEN: Yes. And I can handle that one, Your

1 Honor. This one that we had on the agenda I believe last
2 time, maybe the last two -- well, I guess the last time.
3 And there is a separate litigation that I'm sure you are
4 aware of involving a hernia mesh product, Composite Kugel,
5 and it's impending before an MDL in Rhode Island. It's not
6 a pelvic mesh product. And we would say that the issues in
7 that relate to a component of the device or ring that in
8 some circumstances would break.

9 There were numerous documents, as you can imagine,
10 produced in that litigation subject to a protective order.
11 They weren't produced en masse in this litigation. Again
12 it's a different physician of Bard, a different device,
13 different issue. It's a recall issue. So it's a very
14 different situation.

15 In this litigation, from time to time, plaintiffs have
16 sent us certain of the documents in the other litigation and
17 said, hey, we'd like your permission to use these, or, we'd
18 like your consent to use these in deposition, or, we'd like
19 your consent to basically have them produced in this
20 litigation. And we've had back and forth on that.

21 And as has been, you know, our typical fashion, most
22 often we've agreed to the ones they've presented to us. In
23 some recent depositions, you know, unfortunately we were in
24 the deposition being handed documents that had not been
25 provided to us previously. And Mr. Merrell and I were kind

1 of quickly fumbling through our iPads and information trying
2 to see if we'd seen them.

3 So basically, they were documents from the prior
4 litigation or the separate litigation, brought to the
5 deposition in this case; ones that we had not agreed to
6 before, and, you know, the plaintiffs' counsel had tried to
7 use them with the witnesses, and we objected.

8 So because of that experience, we decided to nip it in
9 the bud, so to speak, and sent a letter at the end of July
10 saying that we're not comfortable with this process; if
11 there is something that they plan to use, using documents
12 from another litigation not produced in this litigation, not
13 agreed to, that we would object to it, but certainly if
14 there were any documents they wanted us to review, then send
15 them to us and we could have a back on forth like we had in
16 the past.

17 We have not received any formal response from
18 plaintiffs' counsel. Mr. Migliori, who I think has been
19 handling this issue, and I were going to speak this morning
20 but we haven't had a chance to, and maybe we'll be able to
21 work it out. But we're not comfortable with the -- I think
22 there were another 15 or so corporate depositions coming up
23 in the next month or two, with just having these documents
24 in the other litigation presented to our witnesses without
25 us having agreed to them being used in this litigation. And

1 that's the essence of our objection and argument.

2 Again, we're always willing to work with opposing
3 counsel and try to reach agreement as to any specific ones,
4 but in the course and midst of the deposition, to have our
5 witness be confronted with a document from another
6 litigation, even if not involving Bard, we just, we don't
7 think that's appropriate.

8 THE COURT: Right. That seems like a legitimate
9 concern to me.

10 MR. GARRARD: Your Honor, this is Henry Garrard.
11 Don Migliori has been working with this and he's been
12 involved in both the Kugel litigation and the Bard, which is
13 against Bard and the transvaginal mesh litigation against
14 Bard, and I have asked him if he would address this with the
15 Court.

16 MR. MIGLIORI: Good afternoon, Your Honor. I
17 just wanted to give you a little context to it, because, as
18 I understand the issue raised, basically, there were several
19 documents in particular that were put on this agenda that at
20 no point was it intended to either to work outside of an
21 understanding or to, to ambush a witness with a document. I
22 think this is more of a misunderstanding than it is anything
23 else. I have been the lead counsel in the Kugel mesh
24 litigation. I have a little different view about the
25 relevance of that litigation. The product involved there

1 involves the exact same meshes that are at issue here. And
2 a lot of the witnesses in this litigation, in fact, do talk
3 about giving all of their expertise in mesh from Davol, the
4 sister company of Bard.

5 These two divisions that are subject to two litigations
6 are both sister companies underneath Bard and both worked
7 together on developing the women's health products that are
8 the subject of the litigation in West Virginia.

9 The protective order in Rhode Island actually
10 specifically allows attorneys from Motley Rice to use
11 documents in that litigation with parties to that
12 litigation.

13 So I just wanted to be clear, the protective order that
14 Ms. Cohen is speaking about actually is the cloak and
15 protection over everybody that was in the room and virtually
16 in this deposition that just took place last month where
17 this miscommunication arose.

18 Also, there were three other litigations before
19 Greenberg Traurig and Ms. Cohen got involved in this
20 litigation where Davol witnesses were deposed in the women's
21 health product MDL, but for, for their knowledge of Davol
22 mesh. And counsel then was a counsel named Richard North
23 who had agreed that we could use documents that are relevant
24 to the witnesses from the Kugel mesh litigation; use the
25 documents from that litigation in the depositions that were

1 being taken pursuant to these notices of subpoena before
2 your court.

3 So there is a history of using these documents. I have
4 no problem with the procedure of identifying the documents
5 intended to be used. I don't think going through the
6 formality of requesting the documents from one litigation to
7 the other is one that needs to be employed. Certainly, an
8 option, but I do think that meeting and conferring on the
9 documents is not unreasonable. It wasn't done because it
10 hadn't -- it had been an understanding, again, before Ms.
11 Cohen got involved, that it wasn't necessary to do that if
12 they were in fact relevant and related.

13 So the seven documents that are referenced in this
14 agenda were documents that I presented to Mr. LeFever
15 (phonetic) last month. I'm still under the protective order
16 by both courts, and the documents were inquired upon; the
17 witness answered the questions appropriately. And the
18 documents share the same protections in this Court as they
19 did in the other court.

20 So I don't think there's a lot of -- I don't think
21 there's certainly any prejudice from the process. There may
22 have been a misunderstanding because of a change of counsel,
23 about whether there was a need to go through a prior
24 meet-and-confer on them. We would have strong objections if
25 there were problems with in the meet-and-confer using a

1 document from a litigation that related to the mesh, because
2 it's highly relevant, but I guess we can approach that as we
3 get -- go forward on these further corporate depositions.

4 I just didn't want there to be a record here that, that
5 there was any deviation from prior deposition procedures or
6 protocols, that there's anybody that saw documents that
7 weren't subject to both protective orders or that there was
8 any attempt to try to circumvent any of the orders.

9 MS. COHEN: Your Honor, if I may just respond
10 briefly?

11 THE COURT: Yes.

12 MS. COHEN: I'm certainly not trying to cast any
13 aspersions on character or any mal intent. I just think
14 that we were concerned in some of these depositions and
15 certainly going forward with documents from other
16 litigation, you know, this particular one or any other one
17 being used with our company witnesses. And we have
18 produced, as I know you've heard us say many times, many
19 millions of pages, over 11 million, and I can't be
20 responsible for knowing every document in other litigation
21 as well. I don't even think I am subject to the protective
22 order in the other MDL. So I think that's a separate issue.

23 As to the agreement with prior counsel, Mr. North, we
24 specifically asked him about this issue. And he said he
25 only agreed to a handful of documents in a December 2012

1 deposition of one witness, in particular, and that's
2 specific to that witness. So he didn't give any kind of a
3 broad-brush agreement, at least that's what we were told,
4 and that's what we put in our letter to Mr. Migliori.

5 And, again, you know, we certainly worked it out in the
6 past. When Mr. Wages sent us several batches of documents,
7 and we agreed to these, and we looked at them carefully and
8 said, okay, we could see some of the relevance. But there
9 may be situations where we don't agree with the relevance.
10 And I think there are at least several of the documents
11 where we said, no, we don't see any relevance here.

12 Mr. Migliori mentioned that the witnesses said they got
13 all of their expertise. I don't think that is accurate.
14 There has been testimony they got some aspects of expertise
15 from Davol. And that's what we would look for in terms of
16 assessing individual documents.

17 So again, there haven't been a lot of battling over
18 this. I think that most often we've been able to reach
19 agreements. But what we're seeking from the Court is
20 guidance, and hopefully a, you know, a ruling or an
21 instruction that, going forward, if there are additional
22 documents other than the ones that we've already agreed
23 could be used, that we're given them in advance, and that we
24 have a chance to talk about them and meet and confer over
25 them.

1 THE COURT: What, what sort of process as far as
2 how, how far in advance do you think you would need to have
3 the documents to give you sufficient time to review them and
4 meet and confer on whether they're relevant?

5 MS. COHEN: Well, we know how busy everyone, you
6 know, is right now. And probably if we had them a week in
7 advance. Mainly Mr. Wages has been sending them to Mr.
8 Merrell. And, in the past, and in large part, we agreed to
9 some of them, and some we didn't agree to. So if there are
10 further documents like that, if they're provided to us a
11 week ahead of time, that would -- we'd be happy to work on
12 that expedited basis.

13 THE COURT: So is there any disagreement with, on
14 the plaintiffs' side with sending the documents that you're
15 going to use that aren't from the transvaginal mesh
16 litigation in advance?

17 MR. GARRARD: This is Henry Garrard.

18 COURT REPORTER: I'm sorry, could you repeat your
19 name, please?

20 MR. GARRARD: Mr. Migliori is going to say
21 something, and then I want to say something. Go ahead, Don.

22 MR. MIGLIORI: Thank you. And I just -- I don't
23 have a problem with that, Your Honor. As the Court knows,
24 from time to time there are -- you know, work that is done
25 on these depositions right up to the time of the deposition,

1 sometimes until the morning of the deposition. I'd just
2 like it to be somewhat flexible. And Ms. Cohen has been --
3 I don't want to suggest otherwise -- somewhat flexible that
4 if there is a document or two that come to the attention of
5 the person preparing for these depositions -- again, because
6 we're all going on so many directions at the same time in
7 this case -- that there be an open-mindedness about
8 reviewing the document there. These generally are one-page
9 E-mails and things like that. And some of them, in fact,
10 even have been publically disclosed as exhibits so they
11 don't have the protections anymore.

12 So as long as there's some kind of an understanding and
13 good faith ability to add to, to supplement that kind of
14 exchange, I don't have a problem with early disclosure of
15 documents.

16 THE COURT: Yeah.

17 MS. COHEN: Your Honor, I don't know if Mr.
18 Garrard wants to say anything. I was just going to say, we
19 are flexible and I think we all work very well together.
20 And hopefully the Court can see that. And if there are --
21 you know, I think we can say a week as an aspirational goal
22 and if there are some that come up at the last minute, we'll
23 be happy to work with plaintiffs' counsel on that.

24 MR. GARRARD: Your Honor, this is Henry Garrard.
25 What I wanted to add to the mix was this: I would like us

1 to have the ability from either side to come to Your Honor
2 if there is a document that one side or the other feels
3 strongly about that we can't agree upon, to bring that to
4 Your Honor's attention and get some ruling from Your Honor
5 in regard to a particular document, should that occur.

6 THE COURT: Certainly. Let me tell you, too,
7 today and yesterday, I ruled on some deposition designations
8 in the Ethicon case that is going to go to trial here
9 shortly. And what I have noticed is there were a lot of
10 documents used that really didn't have anything to do with
11 the product that is at issue in the upcoming trial. And, of
12 course, a lot of that had to do with the fact that, you
13 know, these were discovery depositions, and so there were,
14 there were questions being asked about all kinds of
15 products, and there were questions being asked about hernia
16 mesh and whatnot. And, of course, the discovery is so much
17 broader than what would be admissible at trial. But the
18 problem with doing that, when we get to the point of trying
19 to use these depositions at trial is, a lot of the questions
20 are getting excluded because the admissibility question is
21 different than the discovery question as far as the
22 relevancy and as far as what's prejudicial and what's
23 misleading, and what is -- so, you know, bear that in mind
24 when you're taking your depositions and you're using
25 documents that don't really have to do with the product.

1 I mean, I think -- because as I was going through these
2 depositions and I'm looking at what they're ultimately
3 designating and what the jury is going to hear, they're
4 losing a lot out of their depositions, because of the fact
5 that when they took the depositions, they put way too much
6 in that didn't have anything to do with, you know, the
7 product that's at issue.

8 I just make that point for you to, to bear that in mind
9 as you're taking depositions.

10 MR. GARRARD: Your Honor, this is Henry Garrard.
11 I understand that, but in the things that we're talking
12 about here, there was a close communication between Bard
13 Urological and Davol in terms of the mesh, and there are
14 aspects of the mesh that relates to Davol products that go
15 hand in glove with the mesh in the transvaginal products.
16 So it's a case-by-case basis, and a document-by-document,
17 and witness-by-witness. But there are many things that
18 would be certainly relevant, even though they don't talk
19 about, for example, the Avaulta product.

20 THE COURT: Well, I understand. I understand what
21 you're saying. But the point I'm trying to make is that
22 you use a much sharper knife when you get closer to trial,
23 and I just think maybe you need to bear that in mind when
24 you're taking these depositions, because you sometimes wind
25 up then with a really choppy deposition that isn't nearly as

1 helpful.

2 MR. GARRARD: We certainly had that experience in
3 the Bard system trial, Judge, and I understand it.

4 THE COURT: Yeah.

5 MR. GARRARD: And in Bard, this is not an
6 argument, but part of the practical problem is that many of
7 the depositions wind up having to -- application to
8 different products.

9 THE COURT: No. I understand. And it's tough. I
10 do, I understand that, yes.

11 MR. GARRARD: Okay. Yes, it is.

12 THE COURT: I just thought I'd throw that in for
13 what it's worth. But it sounds to me like you've reached
14 some sort of agreement on the fact that you can give some
15 advance notice on these documents. So I think that's what
16 you need to do. And a week doesn't sound unreasonable at
17 all.

18 MR. GARRARD: We can generally do that, Judge.

19 THE COURT: Okay.

20 MS. COHEN: Thank you, Your Honor, we appreciate
21 it.

22 THE COURT: Ex parte contact with physicians.

23 MS. COHEN: Yes. So this is an issue I think I
24 raised just briefly when we spoke two weeks ago at our last
25 telephonic conference, that looking ahead to the Pretrial

1 Order 131 and the parameters for the physician's written
2 question depositions and that, and how the ex parte, you
3 know, rules would apply. I think I raised that just as a,
4 you know, as a preliminary matter. And giving that, some
5 more thought about that, and we believe that the ex parte
6 ruling should be revisited.

7 THE COURT: I'm sorry, Ms. Cohen. I'm sorry.
8 Would you, would you restate again?

9 MS. COHEN: Yes. No problem. So in light of the
10 Pretrial Order 131, the written question approach to
11 treating physician depositions.

12 THE COURT: Yes.

13 MS. COHEN: We believe in that light of that,
14 that, you know, we respectfully would request that the
15 ex parte ruling that was instituted a while back in the
16 litigation should be revisited in light of that new approach
17 to depositions of treating physicians via written questions.

18 And I think I raised that two weeks ago when we had our
19 telephonic hearing. I realize it's not briefed yet or fully
20 presented. So I thought today that I would propose that we
21 perhaps put together a briefing schedule on this issue, in
22 light of the Pretrial Order 131 schedule. I think the
23 treating physicians likely would take place in October, so
24 we do have a little bit of time, but, you know, now that the
25 cases have been determined, the 300 cases, we would ask that

1 plaintiffs' counsel not reach out or have any contact or
2 have ex parte communication with the treating physicians
3 until this issue is resolved and until we can get it decided
4 by Your Honor.

5 MR. GARRARD: Judge, this is Henry Garrard. We
6 have an order that was entered by Judge Stanley. It's
7 Pretrial Order Number 48, where we are allowed to have
8 ex parte contact, which the law allows us to have. And,
9 frankly, we don't think that there is anything that changes
10 what the Judge did, or should change it. We are under a
11 tremendous time crunch here. We can't wait until October to
12 do justice to our clients in terms of speaking with treating
13 physicians. And if it's got to be briefed, obviously, we'll
14 do it. But this is an issue that, frankly, is already the
15 law of the case, Pretrial Order Number 48, and I don't see
16 that there's anything that's changed that should justify
17 changing what Judge Stanley's already ordered.

18 THE COURT: Well, I'm not sure I'm clear on what
19 the -- what would the change be? What is it you're
20 proposing, Ms. Cohen?

21 MS. COHEN: Well, because under Pretrial Order
22 131, basically, you know, there would be the 30 written
23 questions per physician. And the ex parte access will be
24 particularly prejudicial to the defense, if the plaintiffs,
25 you know, can basically put together their questions, talk

1 to the treating physicians, and then we wouldn't have the
2 ability to do the same. So we think that that -- in light
3 of the unique aspects of Pretrial Order 131, that the
4 plaintiffs' can basically tailor their questions
5 specifically, and especially given the limited questions
6 that we're allowed, and the fact that they will only be in
7 writing, without any give and take, I think that just
8 changes the waterfront. And, at least, we would ask in this
9 context, with this somewhat unique -- I've never experienced
10 an Order exactly like this in terms of treating physicians,
11 but in this context with this -- (inaudible) -- we be
12 allowed to -- either the plaintiffs not have ex parte
13 communications about the questions, about the depositions or
14 the restrictions; they not be able to basically preempt our
15 questions or see what the questions will be or give them the
16 answers ahead of time.

17 So we would just like an opportunity to brief that.
18 And while the briefing takes place, that for this 300 set of
19 cases, that plaintiffs' attorneys not be allowed to reach
20 out to them about this issue until we iron this out, which
21 should not take very long.

22 MR. GARRARD: Judge, this is Henry Garrard. And
23 nothing's changed. They didn't have the right to go to
24 doctors when they were taking seven-hour depositions, and
25 they don't have the right now. So, frankly, there is

1 nothing that has changed.

2 Now, I would say to Your Honor that when we responded
3 to Ms. Cohen's objections to Judge Goodwin's Pretrial Order
4 131, he had what objections she filed in Court. And we
5 responded to those. And, frankly, we're supportive of what
6 the Judge had done. We did make one suggestion to the
7 Court, and that was that for the treating physician
8 depositions, that the Order be slightly modified, and that
9 would be that the defendant provide their 30 questions; we
10 then have those, and we do our 20 questions the Judge has
11 given us. That those then both go to a court reporter, and
12 the court reporter sits down with the doctor to propound the
13 questions. And that we have the right to be on the
14 telephone, each side, at that time, and that each side gets
15 a 15-minute follow-up. If the Judge were to do that, that
16 would seemingly alleviate any problems Ms. Cohen has.

17 But the truth of the matter is, whether she had a
18 seven-hour deposition or whether she's got a deposition by
19 written questions, it doesn't change the fact that we had
20 the right to talk to the treating physicians. In fact,
21 Judge Stanley mused in the hearing we had about that, that I
22 would be derelict if I didn't do that.

23 So I don't think there's any change that justifies any
24 modification of Judge Stanley's order. And under the time
25 frame that we're having to work under from the plaintiffs'

1 side, who have the burden of proof, we have to move as fast
2 as we can move. And we're trying to do that.

3 And the other aspect of it is, it's not like the
4 defendant hasn't had access to many of these doctors,
5 because they had them in training, they talked to them, they
6 wined them, they dined them. So it's not like they've never
7 talked to the vast majority of these in planning positions.

8 THE COURT: All right. Well, number one, if,
9 Ms. Cohen, you're asking me to give permission for the
10 defense attorneys to talk to the treating physicians, that
11 is not something I can do, because I know in some states I
12 just absolutely cannot do that. That would be against the
13 state law. So I can't do that.

14 MS. COHEN: Right.

15 THE COURT: If you're asking me not to allow the
16 plaintiffs' attorneys to speak with the physicians prior to
17 the deposition, then Judge Stanley's already ruled on that.
18 And I'm not going to change her ruling on that. And so if
19 you're asking me to enter an order that says that the
20 plaintiffs' lawyers cannot answer the deposition questions
21 for the doctors -- I mean, they would not surely do that,
22 because would that not be unethical for them to answer the
23 questions for the doctors? I mean, these are deposition
24 questions.

25 Is that what you're asking me, to enter an order to

1 tell them they're not permitted to answer the questions for
2 the doctors?

3 MS. COHEN: Well, no. It's not -- and I agree it
4 would be unethical.

5 THE COURT: Yes. That would be unethical.

6 MS. COHEN: But to, you know, to guide them in how
7 to answer the questions, I think that's a concern. And,
8 again, we're really just asking that, in light of this
9 change of circumstance and new Pretrial Order, that we be
10 allowed to readdress the issue. And as an example, there
11 is -- part of the order of Judge Stanley says that 48 hours
12 prior to the deposition of a treating physician or surgeon,
13 that copies of the documents that are going to be used in
14 the deposition will be produced to the defense.

15 And so, you know, it's hard to imagine how that's going
16 to work in the context of the written questions. And Mr.
17 Garrard, I guess his proposal in response to the objection
18 is not something that we're willing to agree to, the way
19 that that's presented, but we can address that separately,
20 since we just received that I think yesterday.

21 But I think there were parts of the Pretrial Order 48
22 and Pretrial Order 131 which don't, for lack of a better
23 word, don't mesh very well together. And, you know, I think
24 there are changed circumstances that require to take another
25 look at the issue. And that's all we're seeking permission

1 to do.

2 THE COURT: Well, you know -- I think as far as
3 speaking to -- as far as ex parte contact with the
4 physician, the traditional ex parte contact, I don't think
5 that there's anything I would do to change that. As I said,
6 I don't think that I can give the defense attorneys
7 permission to speak with the physicians. Because, as I
8 said, you know, the law varies, and in some states you just
9 can't do it. That's just the way it is. And I couldn't
10 give you authority to do that. And I don't think that I can
11 change Judge Stanley's ruling. I mean, that is -- there
12 would be no reason to do that.

13 I mean, I think that is the law of the case as it
14 stands right now. But I do -- I do think that maybe there
15 would be some reason to look at how this process should be
16 handled as far as the actual written questions themselves
17 and how that deposition in writing will take place. But I'm
18 not sure -- you know, I'm not sure how we go about doing
19 that. I don't think it needs to be briefed. Maybe, maybe
20 there should be some discussion on how that can be carried
21 out in a way that makes the most sense. Certainly neither
22 side ought to be telling the doctor how to answer the
23 question.

24 MS. COHEN: Exactly. And again I --

25 THE COURT: Right, Mr. Garrard; you agree to that?

1 MR. GARRARD: Well, I can't tell a doctor how to
2 answer anything under oath, Your Honor.

3 THE COURT: Right.

4 MR. GARRARD: I think I can say to a doctor: You
5 might be asked this question. What would your answer be?

6 I don't think there's anything wrong with that. But I
7 don't intend and don't think I could sit down and write out
8 an answer for a doctor to a question that is going to be
9 propounded to him through this process. To me, what ought
10 to occur is this: This is in the hands of Judge Goodwin
11 right now.

12 THE COURT: Okay.

13 MR. GARRARD: We responded to Ms. Cohen's
14 objections to the Judge's order. And the only thing we
15 suggested in that related to exactly this. And I just -- I
16 told the Court a moment ago, and I don't think you want me
17 to repeat it, the modification that we suggested, it's
18 before the Judge. And Judge Goodwin will do whatever he
19 intends to do with it. And I would think that's where it
20 probably should stay. And if there's something that occurs
21 there that the parties think is a problem, then certainly we
22 can come back to either him or to you.

23 THE COURT: Right. I think the way to address it,
24 the way to address your concerns, Ms. Cohen, would be to try
25 to figure out how to handle this process so that -- I mean,

1 as Mr. Garrard says, maybe the way to do it is to submit the
2 questions to the physician at one time with a court reporter
3 present or something so that you would have some sense that
4 there isn't any back-dooring going on when the questions are
5 being answered. I would certainly hope that no attorney
6 would sit down with a doctor and tell him how to answer
7 these questions under oath, because I just think that would
8 be absolutely improper.

9 MS. COHEN: Right.

10 THE COURT: You know, that just certainly is not
11 the way it should be done. And I would think -- I would not
12 think that Judge Goodwin would have had that in mind when he
13 set this up. So, you know, maybe that should be -- maybe we
14 ought to ask Kate about how that ought to be addressed
15 and --

16 MS. COHEN: And we can certainly respond to that,
17 to what the plaintiffs filed and fill out our objection or
18 our further thoughts on what they proposed.

19 THE COURT: Right.

20 MS. COHEN: We basically told Ms. Fife that, while
21 we were filing that, that, -- what did we tell her?

22 UNIDENTIFIED SPEAKER: For purposes of preserving
23 the record.

24 MS. COHEN: For purposes of preserving the record,
25 that, you know, we weren't seeking any relief. And if you

1 read our objection, we didn't seek any relief. And we told
2 that to Ms. Fife ahead of time. But now that the plaintiffs
3 have responded, I guess we may have to respond further. And
4 again I don't want anyone to take my comments on this call
5 as an agenda to think I have any lack of respect for the
6 plaintiffs' attorneys, because I know that this is an
7 ethical group. But I think there's a gray zone. I don't
8 think Mr. Garrard or his team is going to -- or any of the
9 plaintiffs' attorneys are going to sit down and say, this is
10 how you must answer this, and let me hand you a sheet of
11 paper that dictates what you should say. But even in the
12 way Mr. Garrard just made his comment gives me some
13 heartburn, because he said, you know: You may be asked the
14 following question, and what would you say about it.

15 And of course as these written questions are delivered
16 to -- in a sequence of days, to a sequence of doctors,
17 obviously everybody will start to see the questions that
18 each side are asking. And there's not much we can do to
19 change them completely. And so they will have a preview.
20 And that's the part that gives me some heartburn, not
21 because I think anyone is intentionally trying to act
22 unethically, but, as I said, there is a gray zone. Even in
23 the way Mr. Garrard said that: You may be asked the
24 following question.

25 You know, it's what comes after that that concerns me.

1 Again, it's not about Mr. Garrard, but there are a lot of
2 people out there.

3 MR. GARRARD: Your Honor -- I'm sorry.

4 THE COURT: Of course that's what happens in those
5 ex parte conferences. I mean, you know, that's what
6 happens. The lawyer goes in and says to the doctor, you
7 know, I expect that -- I expect that the lawyer's probably
8 going to ask you this, that, and the other. And if you're
9 asked that question, what are you going to say?

10 I mean, that's what happens at those conferences.
11 Whether the deposition is taken, you know, under oath, in
12 front of a court reporter orally, or whether it's done in
13 writing, that's what those conference are all about. We all
14 know that. So that's not anything different than the norm.

15 But I think there's maybe some way that the process
16 here could be shored up some so that, you know, that there's
17 no -- there's no participation of the lawyer in the actual
18 answering of the written questions. And maybe that's what
19 needs to take place. And I would say a way to do that is
20 figure that out maybe through Kate or something.

21 MR. GARRARD: Your Honor, I would offer to Ms.
22 Cohen that if she wants to have a discussion with me and my
23 team about that, I'm happy to have that with her.

24 THE COURT: Yes, you can figure out something, I'm
25 sure.

1 MR. GARRARD: If she's got some idea that causes
2 her not to have a need for Roloids, I'd be glad to talk to
3 her.

4 MS. COHEN: Okay.

5 THE COURT: Okay, all right. The last issue here
6 is discovery under PTO 131, various deadlines and
7 coordination and depositions.

8 MS. COHEN: We put this on the list, and I don't
9 think we have anything specific I guess until we get the
10 rest of it ironed out through -- (inaudible) -- flagging
11 this issue is something we will probably continue to talk
12 about, I would imagine.

13 The -- I guess a couple of things that I would just
14 alert the Court to is that we did speak with Mr. Garrard or
15 E-mail with him, you know, last week. And he said that
16 because of the very, very expedited schedule and time frame,
17 that they recognize how quickly everyone needed to mobilize
18 and respond. And so he said he was getting the word out to
19 his troops, and that hopefully they were going to get us
20 dates and proposed locations for the plaintiffs and spouses
21 that was in a manner sufficient for both sides.

22 And so we received some of those, I don't have the
23 exact counts, like Monday and Tuesday of this week, but
24 there are many of the 300 that we have not received any
25 communication, any -- no date, any -- anything at all. So

1 we have concerns about that. And probably we will need -- I
2 think you said two weeks ago that we may need to start
3 Noticing, if we haven't heard from anybody. So we're
4 probably going to have to do that next week.

5 MR. GARRARD: Lori, if you would send to Josh and
6 get Cliff to send to Josh the names of the firms who had not
7 propounded dates to you.

8 MS. COHEN: Okay.

9 MR. GARRARD: I would be more than happy for Josh
10 to reach out to them. I think for all of the cases that my
11 firm has, I believe we have already given you dates for all
12 of them, but if you've got people that haven't and you would
13 like us to reach out to them, I will.

14 I will tell you and tell Judge Eifert that I have had
15 two lengthy phone conference calls with all of these people
16 and have told all of them that they needed to get deposition
17 dates to you immediately. And I don't mind reaching out
18 again, because I'd like to see this move as expeditiously as
19 possible as well, but I don't know who has not given you
20 dates. But if you want to give that to us, we'll reach out
21 again.

22 MS. COHEN: Okay. Yes, we will do that.

23 THE COURT: Because, really, I mean, it's been two
24 weeks now. Really, I mean, they should have had dates for
25 everybody by now.

1 MR. GARRARD: Well, they got all mine, Judge.

2 THE COURT: Okay. Well, they need all the rest.

3 MR. GARRARD: Well, if she'll tell me -- if she'll
4 tell Josh -- we all know who does the work -- if she'll tell
5 Josh, he'll reach out to them immediately. And if they --
6 and then if they don't do it, then they're on their own.

7 THE COURT: All right. What you can do after
8 that, Ms. Cohen, is just start Noticing depositions.

9 MS. COHEN: Right. And we had communication with
10 Mr. Garrard where I think we were in agreement to try and do
11 everything in a coordinated way, maybe at centralized
12 locations, to try and make it as efficient as we could, from
13 both sides.

14 THE COURT: Right.

15 MS. COHEN: Hopefully, that's going to work. But
16 we'll -- I guess we'll report back at our next call.

17 THE COURT: Okay. Sounds great. All right.
18 Well, that looks like we've gone through what was on the
19 agenda then.

20 Is there anything else? We have a couple of minutes
21 left.

22 MR. GARRARD: Not from the plaintiffs' side,
23 Judge. Thank you very much.

24 THE COURT: Thank you. Ms. Cohen?

25 MR. GARRARD: Have a good weekend.

1 THE COURT: You, too.

2 MS. COHEN: No, we're good. Hope your vacation
3 was good.

4 THE COURT: It was very nice. It was great. I
5 got to see some of my friends from high school, a couple
6 that I hadn't seen in 37 years.

7 MS. COHEN: Wow.

8 THE COURT: It was great. I know it was really
9 fun. So, just girls, so that was fun.

10 MS. COHEN: That would be great.

11 THE COURT: It was.

12 MR. GARRARD: I have to tell you a little story on
13 that. I went to my 50th high school reunion recently. And
14 as I start walking in, I overheard the conversation of
15 several of them, and the first conversation was: How many
16 bypasses have you had? And the second --

17 THE COURT: That's depressing.

18 MR. GARRARD: How long have you been on that
19 walker? And of course my wife went with me. I haven't had
20 bypasses, and I don't need a walker. And I said, I think
21 it's time for us to leave. This just doesn't have a good
22 flavor to it.

23 MS. COHEN: I'm sure Judge Eifert friends didn't
24 have any of those issues.

25 THE COURT: No, no, no. We're all young girls

1 yet.

2 MR. GARRARD: You all are young people. Have a
3 good weekend, Judge.

4 THE COURT: You, too. Thank you.

5 MR. GARRARD: Thank you. Bye-bye.

6 MS. COHEN: Thank you very much.

7 THE COURT: Bye-bye.

8 (Proceedings concluded at 3:58 p.m.)

9 REPORTER'S CERTIFICATE

10 I, Catherine L. Schutte-Stant, Official Court
11 Reporter of the United States District Court, for the
12 Southern District of West Virginia, do hereby certify that
13 the foregoing proceedings were transcribed by me to the best
14 of my ability, and said proceedings are a true and accurate
15 transcript from my stenographic notes. I further certify
16 that I am neither related to any of the parties by blood or
17 marriage, nor do I have any interest in the outcome of the
18 above matter.

19

20 NOVEMBER 10, 2014 s/CATHERINE L. SCHUTTE-STANT, RPR, RMR

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